88-1577

Supreme Court, U.S.
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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. FLITCRAFT AND
REBECCA A. FLITCRAFT,
*Petitioners*

v.

UNITED STATES OF AMERICA,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a criminal defendant's right to due process of law is violated when, in a prosecution based on multiple counts of the same offense in different years, the verdict form fails to inform the jury of the year for which a particular count has been charged.

2. Whether, in a prosecution based on multiple counts of the same offense in different years, the district court, in response to a request by a deliberating jury to identify the counts against the defendants included in a verdict form, eliminates the jury's confusion with the requisite degree of "concrete accuracy" by providing the jury with information concerning the substance of the individual counts, but not the year of the alleged violation.

3. Whether interrogation by the government of members of a previous criminal jury, concerning statements made by one of the jurors during deliberations, violates the privilege against disclosure of jury deliberations of the juror whose statements are disclosed.

## LIST OF PARTIES

The parties to the proceedings below were the petitioners, Robert W. Flitcraft and Rebecca A. Flitcraft, and the respondent, United States of America.

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The petitioners, Robert W. Flitcraft and Rebecca A. Flitcraft, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on December 29, 1988.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 863 F.2d 342 (5th Cir. 1988). and is reprinted, with typographical errors. in the appendix hereto, p. 2a, *infra.*

The order of the United States District Court for the Eastern District of Texas (Parker, D.J.) affirming the convictions before a United States Magistrate, is reprinted, with typographical errors, in the appendix hereto, p. 9a, *infra.* No memorandum decision was entered or reported.

## JURISDICTION

On January 22, 1987, the petitioners were convicted before a federal magistrate under 26 U.S.C. § 7203 and 26 U.S.C. § 7205 of failing to make income tax returns and submitting false W-4 forms to employers. Following an affirmance of their convictions by a United States district judge, the petitioners appealed to the United States Court of Appeals for the Fifth Circuit. On December 29, 1988, the Fifth Circuit entered a judgment and an opinion reversing the district court on the counts pertaining to the W-4s and remanding the remainder of the cause for resentencing on all counts relating to failure to file income tax returns. *See* p. 7a, *infra.* The petitioners' petition for rehearing on the portion of the cause remanded was denied by the Fifth Circuit on January 26, 1989.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

On or about May 2, 1983, Rebecca A. Flitcraft, petitioner, was summoned to serve on a jury venire in the

United States District Court for the Eastern District of Texas. In accordance with the jury summons, Mrs. Flitcraft appeared at the federal courthouse on the designated date and at the designated time. As with all jury panelists, she had no prior knowledge of the types of cases on which she might ultimately be called to serve as a juror.

After the jury panel on which Mrs. Flitcraft was serving had been organized and seated, the United States District Attorney informed the panelists that one of the cases on which they might serve as a juror was *United States v. Gary Bass*. Bass was being prosecuted for various alleged income tax violations. Following *voir dire*, Mrs. Flitcraft was selected to serve on the *Bass* jury.

Following a brief trial, the *Bass* jurors retired to the jury room to begin deliberations. As time passed, however, it became obvious that the jury would be unable to reach a unanimous verdict. The sole vote for acquittal was that of Mrs. Flitcraft who, after considering all of the testimony, was unconvinced that Bass had willfully violated the law as required to sustain a conviction. Accordingly, the *Bass* trial ended with a "hung jury" and the concomitant mistrial.

On May 20, 1983, the day the mistrial was declared, the *Bass* jury foreman conferred with Judge Joe Fisher, the presiding judge, regarding, presumably, the content and character of the *Bass* jury deliberations. Based on information related by the jury foreman, Judge Fisher, in open court, instructed the United States attorney's office to investigate the *Bass* jury deliberations. Prior to the court's instructions, the district attorney's office had never conducted an investigation of Mrs. Flitcraft or her husband. Accordingly, as the government has properly

observed, "[t]here can be no serious question . . . as to how [Mrs. Flitcraft] came to the attention of the government initially."

Approximately four months later, on September 23, 1983, the United States District Attorney sought the disclosure of Mrs. Flitcraft's income tax returns and return information for the years 1979 through 1982. In support of its application, the U. S. Attorney alleged that Mrs. Flitcraft had violated 18 U.S.C. § 401(1) and (3), which establishes the power of a court of the United States to punish contempt of court. The purported basis of these allegations was alleged misconduct of Mrs. Flitcraft while serving on the *Bass* jury. The application for an *ex parte* order, however, was aimed solely at the disclosure of tax return information, and was unrelated to the alleged jury misconduct. Moreover, the allegations of the United States Attorney set fourth neither a statement of the essential facts constituting the criminal contempt charged nor the specific acts alleged to have occurred in violation of Section 401. A United States district judge nonetheless entered the requested order for disclosure of tax returns and return information on the same day, September 23, 1983.

Based on the information obtained pursuant to the order for disclosure of tax returns and return information, the district attorney's office determined that Mrs. Flitcraft had not filed income tax returns for the years 1981 or 1982, and that she had submitted an Employee's Withholding Allowance Certificate (form W-4) to her employer in 1982 in which she claimed "exempt" status. Further investigation revealed that Mrs. Flitcraft's husband, Robert W. Flitcraft, had similarly failed to file an income tax return during the years 1981 and 1982, and

had submitted seven W-4's to various employers during 1982 in which he claimed "exempt" status. Records disclosed during the investigation indicated that the gross income received by the Flitcrafts exceeded the maximum amounts by which one might appropriately claim "exempt" status.

Armed with this information, the district attorney's office subpoenaed the eleven other jurors in the *Bass* case to testify before a grand jury in United States District Court. Presumably, these members of the *Bass* jury were questioned regarding statements made by Mrs. Flitcraft during jury deliberations. Moreover, Mrs. Flitcraft received a grand jury subpoena on August 9, 1983. Based on testimony before the grand jury, a twelve-count indictment was handed down on January 19, 1984 and warrants for the arrest of Mr. and Mrs. Flitcraft were issued. The arrests were carried out by United States marshals at the Flitcrafts' home on the evening of January 19, 1984.

The Flitcrafts' first trial occurred on March 19, 1984, but ended on the second day when the presiding magistrate granted the Flitcrafts' motion for a mistrial based on incompetency of counsel. The Flitcrafts were retried from May 9 through May 11, 1984 and were found guilty on all counts. While incarcerated, the Flitcrafts appealed to the United States Court of Appeals for the Fifth Circuit, which reversed and remanded the judgment of the district court, holding that the district court's instructions regarding intent deprived the Flitcrafts of their good faith mistake of law defense.

A third trial began on January 21, 1987 with the Flitcrafts proceeding *pro se* with standby counsel. Notably,

the indictment was never read to the jury. Instead, the prosecutor elected to "summarize" it. The prosecutor failed however, to inform the jury during which years the appellants were alleged to have filed fraudulent W-4's or to which employers they were allegedly submitted. Moreover, the magistrate did not provide this information in the court's charge.

During the government's case-in-chief, fifteen allegedly fraudulently W-4's purportedly signed by Robert Flitcraft were introduced into evidence, although the indictment included only seven W-4 counts against Mr. Flitcraft. Three of the W-4's introduced were submitted to employers other than those included in the indictment. In addition, six W-4's were introduced which had been submitted by Mr. Flitcraft in a year other than 1982 (the only year alleged in the indictment). Finally, with regard to one employer, two allegedly fraudulent W-4's submitted in 1982 were introduced, although the indictment contained only one count concerning that employer.

Jury deliberations began on January 22, 1987. Predictably, the jury was confused by the verdict form which failed to specify the years designated in the various counts or state whether the count in question involved the failure to file a 1040 or the submission of a fraudulent W-4, or, if it involved a W-4, to which employer the allegedly fraudulent W-4 was submitted. In an attempt to obtain guidance and alleviate its confusion, the deliberating jury sent a note to the court which read as follows:

> Could you identify the charges by the number so that we can separate our votes, please.

The court responded by sending a revised verdict form to the jury foreman indicating the subject of the various counts ("Form 1040" or "W-4"). The magistrate's response, however, failed to specify the years applicable to the various counts, and did not identify the employers to which the allegedly fraudulent W-4's had been submitted.

Notwithstanding its predicament, the jury returned a verdict of guilty on all counts. Following an affirmance of their convictions by a United States district judge, the appellants once again appealed to the Fifth Circuit.

On appeal, the Fifth Circuit agreed that "[i]t is patent that the jury was confused as to what evidence applied to which charge of filing false W-4 forms." p. 5a, *infra*. Further, the appellate court held that the method selected by the district court of simply designating the 1040 and W-4 counts as such, was unsatisfactory and did not satisfy the rule of "concrete accuracy" enunciated by this Court in *Bollenbach v. United States*, 326 U.S. 607, 612-13, (1946). p. 5a, *infra*. Thus, because the jury was uninformed about the charges relating to filing false W-4s and "in particular because evidence about doubtful W-4s pertaining to years and employers not mentioned in the indictment were [sic] placed before the jury and may have been taken into account in their [sic] findings of guilt," the Fifth Circuit reversed petitioners' convictions on all W-4 counts. p. 5a, *infra*.

With regard to the remaining counts concerning petitioners' alleged failure to file income tax returns, the Fifth Circuit noted that whether they, too, should be reversed was a "difficult issue." p. 6a, *infra*. The issue was presumably made more difficult by the fact that certain of the irrelevant W-4s not made the basis of a separate count in the indictment were submitted by Mr.

Flitcraft in years other than 1981 or 1982 (the only years for which the petitioners were charged with failing to file income tax returns). Thus, by implication, the petitioners could have been convicted of failing to file returns in years other than those charged. Nevertheless, because the Flitcrafts were convicted on both counts of failing to file 1040s, and further, because the evidence as to each was "crushing," the appellate court held that, in such "unique circumstances," no ground for reversal of the convictions on the 1040 counts existed. p. 6a, *infra*.

## REASONS FOR GRANTING THE WRIT

### I.

**The Fifth Circuit's decision that certain counts in the petitioners' indictment were not constructively amended by the introduction of irrelevant evidence and the failure to provide the jury with sufficient information to enable it to determine during which years the petitioners were charged with having committed the crimes in question, is in direct conflict with decisions of this Court and presents important issues concerning procedures to be utilized by lower courts and prosecutors in submitting cases to juries for decision.**

As a result of the introduction into evidence of more than twice the number of allegedly fraudulent W-4s than the number on which charges were filed, the jury's task at the close of evidence in the present case certainly promised to be a difficult one. The problems that existed at that point, however, were exacerbated by a patently defective verdict form which asked simply whether the jury found the defendants "guilty" or "not guilty" of a

count identified only by number. The verdict form was totally devoid of any information concerning the character of the individual counts charged. Further, the indictment was never read to the jury. Instead, the prosecutor elected to "summarize" it. The "summary" was also inadequate, however, because the prosecutor failed to inform the jury during which years the Flitcrafts were alleged to have filed fraudulent W-4s or to which employers they were allegedly submitted. In addition, the magistrate did not provide this information in the court's charge. The net result was that the jury was absolutely at a loss as to which particular counts applied to which offenses. But for the selfless suggestion of Robert Flitcraft to place the designation "W-4" or "1040" next to the various counts on the verdict form, the haze would indeed have been impenetrable. Even as altered, however, the verdict form failed to indicate for what years the petitioners were convicted of failing to file 1040 forms.

Through the combination of irrelevant evidence of crimes not charged, and the inadequate verdict form, the indictment filed against the petitioners was constructively amended at trial. The theory of constructive amendment has been recognized by this Court for well over a century. *See Ex Parte Bain,* 121 U.S. 1 (1872) and *Stirone v. United States,* 361 U.S. 212 (1960). As stated by this Court in *Stirone*:

> The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. . . . Yet the court did permit that in this case. . . . Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. . . .

> While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus, the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for [matters] which the grand jury did not charge.

*Id.* at 217-18 (citations and footnote omitted). *See also United States v. Miller*, 471 U.S. 1309 (1985).[1] Because, as in the instant case, the district court in *Stirone* admitted evidence which may have provided the basis for the defendant's conviction, this Court held that a constructive amendment of the indictment had occurred at trial, thus requiring reversal. *Stirone*, 361 U.S. at 217.

Despite the mandate of *Stirone*, because "the jury knew that each of the defendants was being charged with failure to file returns in two tax years only," the Fifth Circuit in the present case impliedly held that application of the *Stirone* doctrine was not required. Specifically, the appellate court stated, "Although the

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1. In *Miller*, this Court reaffirmed that portion of *Bain* which stands for the proposition that a defendant cannot be convicted of an offense different from that included in the indictment. 471 U.S. at 142-43. Although this Court in *Miller* rejected that aspect of *Bain* which stands for the proposition that dropping those allegations that are unnecessary to an offense contained within an indictment constitutes an unconstitutional amendment to the indictment, *Id.* at 144, it is not the rejected portion of *Bain* on which petitioners rely.

jury might not have known which count applied to which specific year, lack of that information was not prejudicial since each defendant was found guilty on both counts of failing to file." p. 7a, *infra*.

The Fifth Circuit's reasoning is in direct conflict with decisions of this Court, including *Bain* and *Stirone*, which are intended to ensure that a defendant is not convicted based on evidence of crimes for which he was never charged. Petitioners submit that, in a case involving multiple counts for the same crime in different years, due process is not satisfied unless the jury knows conclusively which count applies to which specific year. As this Court has observed, admission of evidence of crimes not charged in an indictment which might have formed the basis for conviction is fatal error and mandates reversal. *Stirone*, 361 U.S. at 217.

While the petitioners were charged with failing to file 1040s in only two years (1981 and 1982), and the jury found the petitioners guilty on all counts pertaining to 1040s, the introduction of the extraneous W-4s for which the petitioners were not charged, in combination with the defective verdict form, tainted the entire proceeding and requires reversal not only on the W-4 counts, but on the 1040 counts as well. The Fifth Circuit's holding that reversal is not required on the 1040 counts, despite the recognition by that lower court that the jury could not possibly have identified which count applied to which year, cannot be reconciled with decisions of this Court, and creates a confusing precedent for both prosecutors and district courts in determining appropriate procedures to be utilized at trial in submitting cases to a jury for decision.

## II.

**The Fifth Circuit's decision that, in a case involving multiple charges of the same crime in different years, a jury need not be informed on the verdict form of the year during which crimes were allegedly committed, is in direct conflict with decisions of this Court requiring a district court to eliminate with "concrete accuracy" any confusion indicated by a deliberating jury.**

In reversing the district court's judgment on all counts concerning fraudulent W-4s, the Fifth Circuit recognized that "when a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." p. 5a, *infra* (quoting *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946)). In the proceeding below, however, "the haze never lifted." *Id.* As the Fifth Circuit properly noted, "merely characterizing these counts as either 1040 or W-4 ones provided inadequate information for determining criminal guilt or innocence on each count." *Id.* Nevertheless, because the jury was arguably aware that the petitioners had been charged with failure to file returns in two tax years only—1981 and 1982—and since the petitioners were found guilty on all 1040 counts, the Fifth Circuit held that, under the "unique circumstances" presented, the district court's failure to eliminate the jury's self-professed confusion was not fatal with respect to the 1040 counts. In reaching this conclusion, the petitioners submit that the Fifth Circuit improperly limited the scope of *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946) by applying the mandate of this Court's decision to select counts only. Properly considered, *Bollenbach* requires the district

court to eliminate a jury's confusion through lucid and complete instruction, and does not sanction the provision of partial information at the expense of a criminal defendant's right to due process.

When confronted with the tangled web of evidence present in the instant case, admittedly woven by the prosecution and compounded by a grossly inadequate verdict form, the jury's confusion concerning the 1040 counts could only be cleared away with the requisite degree of concrete accuracy by advising the jury not only that a particular count was a 1040 count, but also that the count in question applied to a specific year. The jury's plea for assistance to the district court represented a pivotal moment in the petitioners' trial, *see United States v. Duncan*, 850 F.2d 1104, 1115 (6th Cir. 1988); a moment which, unfortunately, failed to produce concrete accuracy. The rule set forth in *Bollenbach* and its progeny is absolute and should not be disregarded due simply to the fortuity of the jury's willingness to convict the petitioners on all 1040 counts. The verdict, rendered in what the appellate court recognized as a haze of confusion, is a verdict in direct conflict with the petitioners' right of procedural due process.

The effect of the Fifth Circuit's holding is to impermissibly limit the scope of *Bollenbach* and to sanction a district court's provision of incomplete or insufficient information to a jury in direct response to that jury's plea for clarification. Petitioners submit that convictions on all counts of an indictment in a "haze of confusion" is but a conviction on several individual counts in the same haze. Procedural due process must not be dis-

carded after-the-fact simply because the jury was willing to convict the petitioners on all counts.[2]

## III.

**The affirmance by the Fifth Circuit of the petitioners' convictions on certain counts, which resulted from a prosecution initiated because of statements made by Mrs. Flitcraft during jury deliberations in a previous criminal trial, is in direct conflict with Mrs. Flitcraft's privilege against disclosure of jury deliberations as established by decisions of this Court.**

Following Judge Fisher's instruction to begin an investigation of the jury deliberations in *United States v. Bass* (the previous tax case on which Mrs. Flitcraft served as a juror), the district attorney's office obliged by issuing subpoenas for each of the *Bass* jurors. After these jurors had testified before a grand jury, both petitioners were indicted for alleged income tax violations.

The interrogation of the other members of the *Bass* jury violated Mrs. Flitcraft's privilege against the disclosure of jury deliberations. Such deliberations are subject to a general privilege, and the mental processes and thoughts of an individual juror should not be disclosed without his or her consent. *Burton v. United States*, 175

2. One might reasonably question whether the Fifth Circuit's decision would have been the same had the petitioners been convicted on only one 1040 count. Since the penalties for either year, 1981 or 1982, would have been the same, and since it would have been obvious that the jury had convicted the petitioners for one of those years, would the inability of the jury to identify which of the two counts applied to which tax year have made a difference? Carried to its logical extreme, the Fifth Circuit's holding below would not require a different result, thus exposing the inherent flaw in the appellate court's reasoning.

F.2d 960 (5th Cir.), *cert. denied*, 338 U.S. 909 (1949). As eloquently stated by Justice Cardozo in espousing the policy behind this rule:

> For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid.

*Clark v. United States*, 289 U.S. 1, 13 (1933). This same principle has been recognized by a leading commentator:

> The requirements of the general principle of privileged communications are fully satisfied for communications among jurors during retirement. The communications originate in a confidence of secrecy; this confidence is essential to due attainment of the jury's constitutional purpose; the relation of juror is clearly entitled to the highest consideration and the most careful protection; and the injury from disclosure would certainly overbalance the benefits thereby gained. It has therefore always been assumed and conceded that *a juror is privileged not to have his communications to a fellow juror disclosed upon the witness stand against his consent.*

8 WIGMORE, EVIDENCE § 2346 (McNaughton rev. 1961) (emphasis added).

Admittedly, exceptions exist to the general rule against disclosure of jury deliberations. For instance, if the government is inquiring into jury misconduct, the privilege would arguably be unavailable. This possible exception, however, is inapplicable in the instant setting. Although the government began its investigation of the petitioners

under the guise of jury misconduct, Mrs. Flitcraft was never charged with this offense. Moreover, the Government has never presented specific evidence that Mrs. Flitcraft concealed her opinions regarding taxation during *voir dire*. Because the Government failed to establish a *prima facie* case of jury misconduct, they have failed to present sufficient justification to pierce the veil of secrecy which, for reasons of public policy, necessarily cloaks jury deliberations. In the oft-quoted words of Justice Cardozo, the government has failed to establish that "the light should be let in." *Clark v. United States*, 289 U.S. 1, 14 (1933).

An invasion of the sanctity of the jury room, to the proportions of the instant case, runs afoul of all democratic concepts of justice and relegates the judicial process to a meaningless performance. Surely a juror does not leave his First Amendment right to speak freely, without fear of governmental reprisal, at the jury room door. Indeed, such a concept would threaten our entire system of justice. Consider the jurors in the *Bass* trial. Already tentative about ruling in favor of a "tax protestor" for fear of being audited by the Internal Revenue Service, these eleven well-intentioned citizens witness the probing of the supposedly secret deliberative function of the jury on which they sat. They are subpoenaed to testify before a grand jury about statements made by a fellow juror; statements they had been assured would be beyond governmental scrutiny. Through the urging of the judge and the vindictiveness of the prosecutor, the government justified whatever hesitancy to vote for acquittal these eleven jurors harbored, thus making a mockery of their fact-finding function and forever tainting their concept of democracy.

Surely such reprehensible governmental oppression cannot be tolerated. Permitting the fruit of the oppression—the indictment and conviction of the petitioners—to stand, would not only constitute tolerance of such oppression, but would indeed foster its continued vitality.

## CONCLUSION

Because the Fifth Circuit's decision conflicts with decisions of this Court concerning constructive amendment of indictments and the responsibility of a district court to eliminate a jury's self-professed confusion with "concrete accuracy;" because prosecutors and district courts require guidance concerning submission of information in indictments and verdict forms to juries in a manner which comports with a criminal defendant's right to procedural due process; and because the petitioners' indictment and convictions were a direct result of the violation of Mrs. Flitcraft's privilege against disclosure of statements made by her during jury deliberations, this petition for certiorari should be granted.

Respectfully submitted,

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I, Howard L. Close, a member of the Bar of this Court, hereby certify that on this _____ day of March, 1989, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Paul E. Naman, Assistant U. S. Attorney, 700 North Street, Beaumont, Texas 77701, counsel for the respondent herein. I further certify that all parties required to be served have been served.

HOWARD L. CLOSE
470 Orleans Street
Beaumont, Texas 77701
(409) 838-6412
Counsel of Record

APPEARANCE FORM

# Supreme Court of the United States

NO. _____

ROBERT W. FLITCRAFT AND
REBECCA A. FLITCRAFT,
*Petitioners*

v.

UNITED STATES OF AMERICA,
*Respondent*

The Clerk will enter my appearance as Counsel of Record for Robert W. Flitcraft and Rebecca A. Flitcraft, who IN THIS COURT are Petitioners.

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature: _____

HOWARD L. CLOSE
ORGAIN, BELL & TUCKER
470 Orleans Street
Beaumont, Texas 77701
(409) 838-6412

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## AFFIDAVIT OF MAILING PETITION FOR CERTIORARI

Howard L. Close, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On March _____, 1989, I instructed my associate, Gregg R. Brown, to mail to the Clerk of the Supreme Court on that day 40 copies of the petition for certiorari in the above-entitled case, first-class postage prepaid. He subsequently reported to me that he had deposited the envelope containing the copies of the petition for certiorari in a mailbox at the U. S. Post Office, Walden Road, Beaumont, Texas at _____.m. on that day.

HOWARD L. CLOSE
470 Orleans Street
Beaumont, Texas 77701
(409) 838-6412

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public on this _____ day of March, 1989, to certify which witness my hand and seal of office.

_____

Notary Public in and for
The State of Texas

My Commission expires: _____

# APPENDIX

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*United States of America v. Robert W. and Rebecca A. Flitcraft*, 863 F.2d 342 (5th Cir. 1988) ..... 2a

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert W. and Rebecca A. FLITCRAFT,
Defendants-Appellants,

No. 87-2574.

United States Court of Appeals,
Fifth Circuit.

Dec. 29, 1988.

Taxpayers were convicted in the United States District Court for the Eastern District of Texas, Robert M. Parker, J., of failing to file tax returns and filing false withholding exemption certificates, and they appealed. The Court of Appeals, 803 F.2d 184, reversed and remanded. On remand, the District Court again found taxpayers guilty, and they again appealed. The Court of Appeals, Gee, Circuit Judge, held that jury was given inadequate information with regard to particulars of charges that taxpayers had filed false W-4 forms.

Reversed in part, remanded for resentencing.

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Appeal from the United States District Court for the Eastern District of Texas.

Before GEE, SNEED* and WILLIAMS, Circuit Judges.

GEE, Circuit Judge:

This case has already required three trials. The first came to grief because of the incompetency of counsel. A second found the defendants guilty on all charged counts of tax fraud. On appeal, we reversed because of an improper jury instruction on intent. 803 F.2d 184 (5th Cir. 1986). The result of that remand was a third trial, one in which the Flitcrafts were found guilty on all twelve counts of providing false W-4 forms to their employers and failing to file tax returns under 26 U.S.C. §§ 7203 and 7205. We reverse in part and remand for resentencing.

*Background*

Mrs. Rebecca Flitcraft served as a juror in a tax fraud case and was the sole vote for acquittal. The jury foreman mentioned possible jury misconduct to the judge, and federal investigators concluded that neither she nor Mr. Flitcraft had filed income tax for calendar years 1981 or 1982, and that they had filed several false withholding forms in 1982 claiming exemptions from tax. The grand jury returned an indictment on twelve counts.

In the third trial, Robert Flitcraft was again convicted of two counts of failure to file and seven counts of filing false W-4s. Rebecca Flitcraft was convicted on two counts of failure to file and one false W-4 count. At trial the

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* Circuit Judge of the Ninth Circuit, sitting by designation.

defendant waived reading the indictment and the government summarized it. Counts one and two against Robert Flitcraft and counts ten and eleven against Rebecca Flitcraft were explained. Count twelve against Mrs. Flitcraft was described generally.

The remaining counts, three through nine, were described together, and the jury never knew when the Flitcrafts were alleged to have filed false W-4 forms, or with which employers these might have been filed. Because this information was not provided in the charge, the jury never knew to what these counts pertained. The government urges reversal of these counts along with count twelve because the jury never received details of the charges sufficient to allow them to compare the specific charge to the evidence.

Three of the W-4 forms received in evidence were submitted to employers not mentioned in the indictment, and six W-4s introduced were for a year not included in the indictment. The verdict form apparently confused the jury because it listed no years for the counts and failed to specify whether the count charged a failure to file ("1040"), or for filing a false withholding form ("W-4"). The jury asked for assistance with the following written note, which was delivered to the judge:

> Could you identify the charges by number so that we can separate our votes, please.

The court suggested the jury receive the indictment, but the defendants' standby counsel objected. Standby counsel, in fact, objected to every solution discussed, including the one which the judge adopted. The solution chosen was one recommended by Mr. Flitcraft: simply to place "1040" beside the counts charging failure to file, and

"W-4" by the ones related to false withholding forms. No indication of the year was given for any count, nor any of the employers to which the withholding forms were submitted. Even so, the jury found the defendants guilty on all counts.

*Analysis*

[1] It is patent that the jury was confused as to what evidence applied to which charge of filing false W-4 forms. To clarify the verdict form, the jury requested assistance. The defendants' standby counsel agreed to none of the suggested remedies, and the method selected by the judge —simply designating the 1040 and W-4 counts as such— was unsatisfactory. As the United States Supreme Court has held:

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.

*Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 405, 90 L.Ed. 350 (1946). In the circumstances presented, it was the judge's responsibility to clear up the jury's confusion. *United States v. Anderton*, 629 F.2d 1044, 1049 (5th Cir. 1980). But the haze never lifted. The jury never heard the details of the W-4 charges, never knew what evidence applied to which charge, and must have been quite at a loss to understand these counts. Merely characterizing these counts as either 1040 or W-4 ones provided inadequate information for determining criminal guilt or innocence for each count.

Commendably, the government recommends reversal on the W-4 counts. Although the government's recommendation does not bind us, it is entitled to great weight. *Young v. United States*, 315 U.S. 257, 258-59, 62 S. Ct. 510, 511-12, 86 L.Ed. 832 (1942); *Every v. Blackburn*, 781 F.2d 1138, 1140-41 (5th Cir. 1986). Because the jury was uninformed about the charges relating to the filing of false W-4s, and in particular because evidence of doubtful W-4s pertaining to years and employers not mentioned in the indictment were placed before the jury and may have been taken into account in their findings of guilt, we must reverse on those counts.

[2] Whether the rest of the counts should be reversed is a difficult issue. The government contends that the jury knew what it was doing with regard to counts one, two, ten and eleven because the prosecution explained those counts in the summation of the indictment. The notation of "1040," the prosecution suggests, reminded the jury that these counts related to failure to file income tax returns. While conceding that the procedure of answering the jury's request for help by making the notation was "unorthodox," the prosecution claims that enough information was available to determine guilt fairly.

The fact is that the jury knew that each of the defendants was being charged with failure to file returns in two tax years only—1981 and 1982. Although the jury might not have known which count applied to which specific year, lack of that information was not prejudicial since each defendant was found guilty on both counts of failing to file. As to each, the evidence was crushing, and as to none was any significant extraneous or misleading evidence before the jury. In these unique circumstances, we

conclude that the circumstance that the jury may not have known which "guilty" finding written down by their foreman applied to which count is not of significance. They knew that they were finding each defendant guilty of both charged counts of failure to file; that suffices. As a result, no grounds for reversal exist and these counts are remanded for resentencing.

[3, 4] Finally, the defendants further assert impropriety in the investigation of the mistrial where Mrs. Flitcraft served as a juror. They cite *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) as support for the proposition that Mrs. Flitcraft's expression of her views against taxation was a coerced confession. In addition to the obvious fact that Mrs. Flitcraft was not in custody as required by *Miranda,* however, Mrs. Flitcraft never asserted her fifth amendment right to silence, which would have been the proper response to an incriminating question. The investigation was proper and no error is shown. See *Clark v. United States,* 289 U.S. 1, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1933). The argument that it is a violation of the fifth amendment right against self-incrimination to have to sign a W-4 form and 1040 tax return is similarly without merit. *Garner v. United States,* 424 U.S. 648, 96 S. Ct. 1178, 47 L.Ed.2d 370 (1976). Nor does the Fifth Amendment afford a defense when no income is reported. *United States v. Shivers,* 788 F.2d 1046, 1048 (5th Cir. 1986).

The judgment of the district court is therefore REVERSED on the counts pertaining to the W-4s and the cause is REMANDED for resentencing on all counts relating to the 1040s.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 87-2574

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT W. FLITCRAFT and
REBECCA A. FLITCRAFT,
Defendants-Appellants.

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Appeal from the United States District Court for the
Eastern District of Texas

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ON PETITION FOR REHEARING

(January 26, 1989)

Before GEE, SNEED* and WILLIAMS, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

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* Circuit Judge of the Ninth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CAUSE NO. B-84-03-CR

UNITED STATES OF AMERICA

v.

ROBERT W. FLITCRAFT AND
REBECCA A. FLITCRAFT

(Filed May 22, 1987)

ORDER

Now comes the Court, pursuant to Appellants' Appeal of their finding of guilt and convictions in a jury trial held before United States Magistrate Harry W. McKee, and enters the following Order AFFIRMING Appellants' convictions.

Appellants were tried by a jury on January 21 and 22, 1987 before U.S. Magistrate McKee. The jury found Defendant Robert Flitcraft guilty of counts 1 and 2; failure to make income tax returns and counts 3-9; submitting false W-4 forms. The jury found Rebecca Flitcraft guilty of count 10 and 11; failure to make income tax returns and count 12; submitting a false W-4 form. Defendant Robert Flitcraft was sentenced to one year as to count 1, one year as to count 2 to run consecutively with the sentence in count 1. In counts 3-9, imposition of sentence was suspended and Robert Flitcraft was placed on probation for five years for each count to run concurrently with each other and to run

consecutively with the sentences in counts 1 and 2. Rebecca Flitcraft was sentenced to one year as to count 10 and 11. For count 12, imposition of sentence was suspended and she was placed on probation for five years. Counts 11 and 12 are to run concurrently with each other and are to run consecutively with count 10. Both Appellants were also ordered to pay restitution to the IRS.

Appellants have filed notice of appeal of their convictions and have filed a brief in support of their appeal.

The Court has reviewed Appellants' brief and, based on the arguments and authorities cited therein, affirms Appellants' convictions and sentences.

Although Appellants brief is convoluted and replete with various propositions and argument, the Court finds that Appellants main ground of error contends that their rights against self incrimination as guaranteed by the Fifth Amendment to the United States Constitution as well as the Texas State Constitution were violated at various points throughout the trial before Magistrate McKee. Appellants cite various points where Magistrate McKee overruled objections, did not include requested jury instructions or made other alleged errors. Such alleged errors include the introduction of Appellants W-4 forms and 1040 forms over objection that the forms were not admissible because Appellants were not advised when they filed the forms that they were waiving their rights. Other alleged errors are based on the same contentions that due to violations of Appellants rights against self incrimination, Magistrate McKee committed various errors which allegedly impinged upon Appellants right to a fair trial.

The Court has reviewed Appellants self incrimination arguments and finds them to be wholly without merit. Magistrate McKee did not commit error in the conduct of the trial in regards to Appellants claims that their rights against self incrimination were violated.

The Court affirms the conviction and sentence of Robert Flitcraft and Rebecca Flitcraft.

Signed this 20th day of May, 1987.

/s/ ROBERT M. PARKER
Robert M. Parker
United States District Judge

Supreme Court, U.S.
FILED
APR 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1577

# In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. FLITCRAFT AND REBECCA A. FLITCRAFT,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the counts of the indictment charging that petitioners failed to file income tax returns were constructively amended by the proceedings at trial.

2. Whether a question from the jury about which counts of the indictment referred to which charges requires reversal of petitioners' convictions.

3. Whether petitioners' convictions must be reversed because the government's investigation in this case arose from a charge of juror misconduct in a previous case in which petitioner Rebecca Flitcraft served as a juror.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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No. 88-1577

ROBERT W. FLITCRAFT AND REBECCA A. FLITCRAFT,
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*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is reported at 863 F.2d 342. The order of the district court (Pet. App. 9a-11a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 29, 1988. A petition for rehearing was denied on January 26, 1989 (Pet. App. 8a). The petition for a writ of certiorari was filed on March 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a third jury trial,[1] petitioner Robert Flitcraft was convicted on seven counts of providing false withholding exemption certificates (Forms W-4) to his employers, in violation of 26 U.S.C. 7205, and two counts of failing to file income tax returns for taxable years 1981 and 1982, in violation of 26 U.S.C. 7203. Petitioner Rebecca Flitcraft was convicted on one count of filing a false Form W-4, in violation of 26 U.S.C. 7205, and two counts of failing to file income tax returns for taxable years 1981 and 1982, in violation of 26 U.S.C. 7203. Pet. App. 3a. Petitioner Robert Flitcraft was sentenced to consecutive one-year terms of imprisonment on Counts 1 and 2 (failure to file), to be followed by concurrent five-year terms of probation for each of Counts 3 through 9 (false Forms W-4). Petitioner Rebecca Flitcraft was sentenced to one year's imprisonment on Counts 10 and 11 (failure to file), to be followed by five years' probation on Count 12 (false Form W-4). The court of appeals reversed in part and remanded for resentencing (Pet. App. 2a-7a).

1. Petitioner Rebecca Flitcraft served as a juror in a criminal tax trial in which she provided the lone vote to acquit. That case ended in a mistrial. The jury foreman informed the presiding judge of the possibility of impropriety in the jury's deliberations. The judge then instructed the United States Attorney to investigate the jury deliberations. During the course of its investigation, the government discovered: (1) that petitioners had filed many Forms W-4 with their employers that falsely claimed that petitioners were exempt from tax and (2) that petitioners had failed to file income tax returns for taxable years 1981 and 1982. Pet. App. 3a.

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[1] The first trial ended in a mistrial, and the second trial ended in convictions that were reversed by the court of appeals (Pet. App. 3a).

At trial, petitioners waived the court's reading of the indictment. The prosecutor therefore summarized the indictment for the jury (Pet. App. 4a). The prosecutor explained that Count 1 charged that Robert Flitcraft failed to file an income tax return for 1981 and that Count 2 made the same charge for the year 1982. The prosecutor also informed the jury that Counts 10 and 11 charged Rebecca Flitcraft with the same crimes for the same years (*ibid.*). The prosecutor, however, did not explain the details of the remaining counts, which alleged that petitioners filed false Forms W-4.

During its deliberations, the jury asked for clarification of the charges by sending the following request to the judge:

> Could you please identify the charges by number so that we can separate our votes, please.[2]

Pet. App. 4a. The court suggested sending the indictment to the jury to clear up any confusion. Petitioners' standby counsel objected to that procedure and to every other proposed solution to the jury's confusion (*ibid.*). Petitioner Robert Flitcraft then suggested that the counts be identified by placing "1040" next to the failure-to-file charges and "W-4" next to the charges for the false withholding certificates. The court followed Robert Flitcraft's suggestion (Pet. App. 4a-5a). The jury then found petitioners guilty on all counts.

2. The court of appeals reversed petitioners' convictions for filing false withholding-exemption certificates. The court concluded that it was clear that the jury was confused as to what evidence applied to the various charges of filing false Forms W-4 (Pet. App. 5a). The court noted that the indictment was not read to the jury.

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[2] The verdict form did not describe the counts, but simply listed the counts by number.

Furthermore, the prosecutor's summary of the counts charging the filing of false Forms W-4 did not tell the jury when petitioners were alleged to have filed the false forms or with which employers those forms might have been filed. In the court's view, the remedy selected to eliminate the jury's confusion—designating the counts on the verdict form as "1040" and "W-4"—was not satisfactory (*ibid.*).

The court of appeals, however, affirmed petitioners' convictions for failing to file tax returns. After reviewing the record, the court concluded that the jury knew that each petitioner was charged with failure to file returns in two years—1981 and 1982. The court reasoned that, although the jury might not have known which count applied to which year, the lack of that information was not prejudicial because each petitioner was found guilty on both counts of failing to file income tax returns. The court observed that the evidence on the failure-to-file counts "was crushing" and that no significant extraneous or misleading evidence was before the jury on those counts (Pet. App. 6a). Accordingly, the court of appeals held that the fact "that the jury may not have known which 'guilty' finding written down by their foreman applied to which count is not of significance * * * [as] [t]hey knew that they were finding each defendant guilty of both charged counts of failure to file" (Pet. App. 7a).

Finally, the court of appeals rejected petitioners' argument that the government improperly began this investigation as a result of statements made by petitioner Rebecca Flitcraft when she served as a juror. The court ruled that the government conducted the investigation properly and did not violate Rebecca Flitcraft's Fifth Amendment rights. Pet. App. 7a.

## ARGUMENT

1. Petitioners claim (Pet. 9-11) that the indictment was constructively amended by the proceedings at trial. Petitioners assert (Pet. 9) that the indictment was "amended" by the prosecutor's submitting evidence relating to false Forms W-4 that were not charged in the indictment and by the court's submitting a verdict form to the jury that did not describe the charges. That claim does not warrant reversal of petitioners' convictions at issue here—those for failing to file tax returns.

A constructive amendment of an indictment is an alteration of its terms "by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States* v. *Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986); see also *Stirone* v. *United States*, 361 U.S. 212, 218-219 (1960). Here, the indictment charged that petitioners willfully failed to file income tax returns for 1981 and 1982. The government did not introduce any evidence tending to show that petitioners failed to file income tax returns for any years other than those charged in the indictment. Moreover, as the court of appeals observed (Pet. App. 6a), the jury knew that each petitioner had been charged with failing to file income tax returns only for 1981 and 1982. Petitioners point to no instruction that might have led the jury to believe that it could convict petitioners for a failure to file a return in any other year. To be sure, the verdict form did not set out the years to which the failure-to-file charges related. But that form also did not suggest that petitioners could be convicted for a failure to file for any year other than 1981 or 1982. Accordingly, the evidence at trial and the jury form did not constructively

amend the charges of failing to file tax returns for the years 1981 and 1982.

2. Petitioners next contend (Pet. 12-14) that their convictions must be reversed because the judge failed to eliminate the confusion indicated by the jury. During its deliberations, the jury requested clarification as to the counts listed on the verdict form. After petitioners' standby counsel objected to every proposed solution, the judge, at the suggestion of petitioner Robert Flitcraft, simply noted which counts related to false Forms W-4 and which related to failing to file tax returns. The court of appeals ruled that the solution chosen by the judge was unsatisfactory for the counts relating to filing false Forms W-4. Nevertheless, as the court of appeals recognized (Pet. App. 6a-7a), the jury was adequately instructed on the failure-to-file counts. The jury knew that both petitioners were charged with failing to file income tax returns for 1981 and 1982. The jury found each petitioner guilty on both counts charging a failure to file. Under those circumstances, petitioners were not prejudiced even if the jury did not know which count on the verdict form applied to 1981 and which applied to 1982.

3. Petitioners lastly contend (Pet. 14-17) that their convictions must be reversed because the government discovered their tax violations as a result of its investigation into charges of juror misconduct at the trial in which petitioner Rebecca Flitcraft served as a juror. They claim (Pet. 14) that the government's questioning of the jurors in the earlier trial about statements made by petitioner Rebecca Flitcraft violated the privilege prohibiting inquiry into a jury's deliberations.[3] There is no merit to that claim.

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[3] Petitioners do not explain why this claimed violation of Rebecca Flitcraft's privilege should be used to reverse the convictions of Robert Flitcraft.

As petitioners recognize (Pet. 15), the rule protecting jury deliberations from disclosure is subject to exceptions. See *Clark* v. *United States*, 289 U.S. 1, 13 (1933). In *Clark*, this Court ruled that to refuse to allow an investigation of jury deliberations where there is a suspicion of juror misconduct or tampering would be "paying too high a price for the assurance to a juror of serenity of mind." *Id.* at 14. Here, the jury foreman at the earlier trial made allegations of juror misconduct. Thus, the government properly followed the presiding judge's instruction and began an investigation into those charges. See *Tanner* v. *United States*, 107 S. Ct. 2739, 2751 (1987) (investigation of juror misconduct permissible if juror testimony limited to extrinsic matters).

Petitioners argue (Pet. 15-16) that the "misconduct" exception to the rule against inquiring into jury deliberations does not apply here because petitioner Rebecca Flitcraft was not ultimately charged with juror misconduct. There is no support for that proposition. As long as the investigation of juror misconduct was properly begun in the first place, there is no justification for a rule that would preclude prosecution for any crimes discovered as a result of that investigation. Cf. *Abel* v. *United States*, 362 U.S. 217, 240 (1960). Moreover, during petitioners' trial, the government did not submit any evidence regarding the prior jury deliberations. Rebecca Flitcraft has not been held to answer for her conduct as a juror or for anything she said during those deliberations. The court of appeals therefore correctly rejected petitioners' argument that the government's investigation was unlawful.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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